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Criminal Law—Coram Nobis

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rendering the judgment.²⁶ The magistrate may be compelled to file this return²⁷ or, if it is defective, may be compelled to file an amended return.²⁸

In *People v. Mason*²⁹ the Court decided that a magistrate's return, once filed and not challenged by the appellant, is to be deemed sufficient and correct, and is to be deemed so admitted by the appellant. In the instant case, affidavits were filed by the appellant, assigning errors including failure of the magistrate to advise defendant of his right to counsel and failure to warn that a conviction or a guilty plea to the charge of driving while intoxicated³⁰ might lead to the revocation or suspension of the defendant's operator's license.³¹ The magistrate's return definitely controverted these allegations of error, but the appellant in no way moved to have the return amended. Thus the return must be deemed correct, and defendant's affidavits could not stand before it.³²

New Trial

The New York Code of Criminal Procedure provides that a new trial may be granted on the ground of newly-discovered evidence³³ only if³⁴, (1) the evidence is such as will probably change the result if a new trial is ordered, (2) it has been discovered since the trial, (3) it could not have been discovered before the trial by the exercise of due diligence, (4) it is material to the issue, (5) it is not cumulative to the former issues, and (6) it does not merely impeach or contradict the former evidence. In *People v. Salemi*³⁵ the defendant, awaiting execution for murder, claimed that he had unearthed evidence that the only witness who identified him as the killer had been committed to an insane asylum the day the verdict had been returned, and also that the victim's dying declaration, which identified defendant as the assailant, could not possibly have been spoken because of decedent's physical condition. Defendant also claimed that new evidence would show that the witness to whom the dying declaration was supposedly addressed could not have been in decedent's presence at the time he claimed the declaration was made to him.

26. *Id.*, §756.

27. *Id.*, §757.

28. *Id.*, §758.

29. 307 N. Y. 570, 122 N. E. 2d 916 (1954).

30. N. Y. VEHICLE AND TRAFFIC LAW §70 (5).

31. N. Y. CODE CRIM. PROC. §335-A.

32. *People v. Hilliker*, 50 N. Y. S. 2d, 509 (1944); *People v. Chambers*, 189 Misc. 502, 74 N. Y. S. 2d 293 (1947).

33. N. Y. CODE CRIM. PROC. §465 (7). See *People v. Priori*, 164 N. Y. 459, 472, 52 N. E. 668, 672 (1900); *People v. Eng Hing and Lee Dock*, 212 N. Y. 373, 392, 106 N. E. 96, 102 (1914).

34. 309 N. Y. 208, 128 N. E. 2d 377 (1955).

35. N. Y. CODE CRIM. PROC. §528 provides: "... When the judgment is of death, the court of appeals may order a new trial, if it be satisfied ... that justice requires"

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The Court, after a careful review of the evidence in support of these allegations, *held*, that none of the requirements for a new trial had been met. The dissenters were of the opinion that there was substance in defendant's contentions, which a jury should be allowed to pass upon. Judge Desmond's excellent separate dissent reinforced the minority position that the required tests for a new trial had been met; he further urged that even if they had not, the latitude provided by the Code of Criminal Procedure allowed the granting of a new trial if justice should so require, and that the present case fell within this definition.

Coram Nobis

In an application for a writ of error coram nobis, the applicant is entitled to a hearing in open court unless the prosecution conclusively rebuts his allegations by unquestionable documentary proof.³⁶ This right is guaranteed under the "due process" clause of the Federal Constitution,³⁷ and by state statute.³⁸ In *People v. Hendricks*,³⁹ petitioner contended that he was not represented by counsel when he pleaded guilty nor when he was sentenced in 1939. The prosecution introduced proof that a "notice of assignment" was sent to *Pierce J. Ryan* as attorney for defendant, and was acknowledged by him. The official stenographic minutes also indicated that defendant was represented by *Pierce J. Ryan*, but the court clerk's minute book showed that *John J. Ryan* appeared for defendant at arraignment and sentence. *John J. Ryan* categorically denied ever having represented defendant, but *Pierce J. Ryan* merely stated that he had no present recollection of having represented him.

The Court held, the error was merely clerical,⁴⁰ and as such did not overcome the presumption of regularity. The dissent felt that the confusion evidenced between the clerk's minute book and the stenographer's minutes, not only as to the name of the attorney but also as to the alleged date that he appeared, was sufficient to rebut this presumption.⁴¹ Undoubtedly the basis of the majority decision is the fear that slight mis-spellings or discrepancies in court records might lead to a flood of such petitions if they held otherwise, and therefore the "wild ass of the law" would become entirely unmanageable.

36. *People v. Langan*, 303 N. Y. 474, 104 N. E. 2d 681 (1952).

37. *Mooney v. Holahan*, 294 U. S. 103, 113 (1934).

38. N. Y. CONST, art. I, §6; N. Y. CODE CRIM. PROC. §§188, 308.

39. 303 N. Y. 486, 127 N. E. 2d 281 (1955).

40. See *People v. Corso*, 277 App. Div. 940, 99 N. Y. S. 2d 937 (2d Dep't 1950).

41. *People v. Richetti*, 302 N. Y. 290, 296; 97 N. E. 2d 908, 911 (1951). *People v. Langan*, *supra*, note 1. *Bojinoff v. People*, 299 N. Y. 145, 85 N. E. 2d 909 (1949).